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Supreme Court of the United States

FERRING B.V., FERRING PHARMACEUTICALS, INC., and AVENTIS PHARMACEUTICALS, INC.,

Petitioners,

v.

MEIJER, INC., MEIJER DISTRIBUTION, INC., ROCHESTER DRUG CO-OPERATIVE, INC., and LOUISIANA WHOLESALE DRUG CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Circuit has "exclusive jurisdiction" over all appeals that are based "in whole or in part" on patent issues. 28 U.S.C. § 1295(a)(1). Accordingly, courts have consistently held that a *Walker Process* claim (i.e., an antitrust claim alleging enforcement of an invalid patent that was procured through fraud) lies within the *exclusive* jurisdiction of the Federal Circuit. In this case, however, the Second Circuit held that the Federal Circuit lacks jurisdiction over a *Walker Process* claim if plaintiffs include non-patent allegations in the same count. The court reached this conclusion even though it acknowledged that the patent fraud allegations are "the linchpin" of the case and even though the non-patent allegations would *not* provide plaintiffs a basis for obtaining all the relief they seek.

The question presented is whether the Second Circuit's new jurisdictional standard conflicts with this Court's decision in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988), and with decisions of the Federal Circuit and Seventh Circuit, holding that the Federal Circuit has exclusive jurisdiction in any patent-based case in which patent issues must be resolved in order for plaintiffs to achieve the overall success of their claim and obtain all the damages (or other relief) they seek.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioner Ferring B.V. is a wholly owned subsidiary of Ferring Holding SA, a Swiss company; Petitioner Ferring Pharmaceuticals, Inc. is a wholly-owned subsidiary of Ferring Holding Inc., which is a wholly-owned subsidiary of Ferring B.V.

Sanofi-Aventis is the parent corporation of Petitioner Aventis Pharmaceuticals, Inc. (formerly known as Hoechst Marion Roussel, Inc.); no other publicly held company owns 10% or more of Aventis Pharmaceuticals, Inc.

Respondents are Meijer, Inc., Meijer Distribution, Inc., Rochester Drug Co-Operative, Inc., and Louisiana Wholesale Drug Co., Inc.

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Petitioners, Ferring B.V., Ferring Pharmaceuticals, Inc. and Aventis Pharmaceuticals, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 585 F.3d 677. Pet. App. 1a-34a. The opinion of the district court is unreported. Pet. App. 35a-55a.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 2009. Petitions for rehearing were denied on December 29, 2009. Pet. App. 56a-57a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1295(a) of Title 28, U.S.C., provides in pertinent part:

> (a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—
>
> > (1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands,

> or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights, exclusive rights in mask works, or trademarks and no other claims under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title;

Section 1338 of Title 28, U.S.C., provides in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

STATEMENT OF THE CASE

When Congress created the U.S. Court of Appeals for the Federal Circuit in 1982, its "central purpose" was two-fold: (i) "to reduce the widespread lack of uniformity" in appellate decisions involving patents, and (ii) to eliminate appellants' "incentive to forum-shop" among courts of appeals in an effort to locate the most hospitable tribunal to hear appeals involving patents. H.R. Rep. No. 97-312, at 23 (1981). To achieve these

goals, Congress granted *exclusive* jurisdiction to the Federal Circuit in all appeals that are based *in whole or in part* on patent law issues. 28 U.S.C. § 1295(a).

The Second Circuit ignored both the language and purpose of 28 U.S.C. § 1295(a) and adopted an erroneous jurisdictional standard that conflicts with (i) the standard set forth by this Court in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988), and (ii) other circuit decisions in similar cases, including the Federal Circuit. In *Christianson*, this Court ruled that the Federal Circuit has *exclusive* jurisdiction over any appeal if at least one claim in the case raises substantial patent questions. As *Christianson* made clear, the fact that a plaintiff includes non-patent allegations as part of a patent-based claim is of no jurisdictional significance if the plaintiffs must address patent issues in order to obtain "the relief [they] seek" and achieve "overall" success with respect to that claim. *Id.* at 810. Here, the Second Circuit effectively re-wrote the requirements in *Christianson*. Although it recognized that patent issues are "the linchpin" of this case, Pet. App. 15a, the Second Circuit ruled that it, rather than the Federal Circuit, has jurisdiction to hear the appeal because plaintiffs included a non-patent allegation that would (if proved) entitle plaintiffs to *some* of the relief sought in their complaint. *Id.* at 15a-16a. The Second Circuit reached this astonishing conclusion even though the non-patent allegation was based on different conduct by the defendants at a different point in time, causing different injuries, and providing a basis only for damages sustained in the last few months of the multi-year period in which plaintiffs claim that defendants monopolized the market. This mischievous ruling flouts both the

letter and spirit of *Christianson*. It conflicts with decisions of the Federal Circuit and Seventh Circuit holding that the Federal Circuit has exclusive jurisdiction over cases in which patent issues must be resolved in order for a plaintiff to achieve the overall success of its claim. Finally, it thwarts Congressional intent by enabling litigants to avoid the Federal Circuit simply by artful pleading.

The Second Circuit's decision carries serious consequences for both patent policy and judicial administration. By asserting jurisdiction here, the Second Circuit was able to address an important question of patent law and policy: whether customers who *lack* standing to challenge patents directly under patent law can circumvent this prohibition by attacking the same patents under antitrust law. That issue should have been resolved by the Federal Circuit, which Congress created expressly for the purpose of resolving such patent policy issues in a uniform fashion. Instead, the Second Circuit arrogated to itself the power to rule on this important patent policy issue.

1. Factual Background

a. The Parties. Plaintiffs/respondents are drug wholesalers and retailers. They allege that defendants/petitioners (Ferring and Aventis) violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in an "overarching scheme" to monopolize the relevant market by fraudulently procuring and enforcing a patent covering the tablet form of desmopressin acetate ("the '398 patent"). Pet. App. 74a. Desmopressin acetate (which is sold under the trade name DDAVP) is a

pharmaceutical compound that is used to treat diuretic symptoms associated with diabetes insipidus (a water metabolism disorder) and to manage primary nocturnal enuresis (bed-wetting).

b. Regulatory Framework. The Federal Food, Drug, and Cosmetic Act ("FD&CA"), 21 U.S.C. §§ 301-399a, requires a company seeking to market a new drug to file a New Drug Application ("NDA") with the U.S. Food & Drug Administration ("FDA") and to obtain the agency's approval prior to marketing that drug. If an approved drug is covered by certain types of patents, the NDA holder must identify those patents to the FDA for inclusion in an FDA publication entitled "Approved Drug Products with Therapeutic Equivalence Evaluations," commonly known as the "Orange Book." Pet. App. 67a.

In certain circumstances, the FD&CA permits companies to obtain approval to market the generic equivalent of a drug by filing an Abbreviated New Drug Application ("ANDA") and showing, among other things, that the generic product is bioequivalent to the approved product. *Id.* at 69a. If it seeks FDA approval to sell a generic drug before any patent listed in the Orange Book expires, a generic drug manufacturer must certify to the FDA that its generic drug will not infringe the patents listed in the Orange Book, and/or that the listed patents are invalid. 21 U.S.C. § 355(j)(2)(A)(vii)(IV) (known as a "Paragraph IV Certification"). The generic drug manufacturer also must give notice of this Paragraph IV Certification to the NDA holder and the patent owner. 21 U.S.C. § 355(j)(2)(B)(iv). If the NDA holder and/or patent

owner files a patent infringement suit within forty-five days of receiving notice of the Paragraph IV Certification, the FDA may not approve the ANDA until the shorter of thirty months from the receipt of that notice or a ruling on the merits by the district court. 21 U.S.C. § 355(j)(5)(B)(iii).

c. Underlying Patent Infringement Litigation. In July 2002, a generic drug manufacturer, Barr Laboratories, Inc. ("Barr") (who is not involved in the present proceedings), submitted an ANDA that sought FDA approval to market generic DDAVP tablets prior to the expiration of Ferring's '398 patent. Pet. App. 87a. Barr's ANDA included a Paragraph IV Certification that the '398 patent was invalid and/or unenforceable. *Id.* Ferring (the patent owner) and Aventis (the NDA holder and exclusive licensee of the patent) duly filed suit in the U.S. District Court for the Southern District of New York, Complaint, *Ferring B.V. v. Barr Labs., Inc.*, No. 02-Civ-9851 (S.D.N.Y. Dec. 13, 2002), alleging that Barr's filing of an ANDA to market a generic version of DDAVP tablets infringed the '398 patent (the "Patent Litigation"). Pet. App. 88a.

In a summary judgment opinion issued on February 7, 2005, the district court found that the '398 patent was unenforceable because of inequitable conduct before the United States Patent and Trademark Office ("PTO") — namely, Ferring failed to disclose that some of the scientific affiants who supported the patent application had prior relationships with Ferring. *Ferring B.V. v. Barr Labs., Inc.*, No. 02-Civ.-9851 (CLB), 2005 WL 437981, at *10 (S.D.N.Y. Feb. 7, 2005). The district court did *not* conclude that the '398 patent was procured by

fraud on the PTO; the court did *not* conclude that the prior relationships would have barred the issuance of the '398 patent; and the court did *not* conclude that the patent was invalid. It simply held the patent to be unenforceable. *Id.* Subsequently, in denying Barr's motion for attorney's fees, the court specifically explained that, although it had held the patent unenforceable on the grounds of inequitable conduct, it "never found conduct rising to the level of fraud." Transcript of Record at 34, *Ferring B.V. v. Barr Labs., Inc.*, No. 02-Civ.-9851 (Mar. 1, 2007).

On February 15, 2006, a sharply divided panel of the Federal Circuit affirmed the district court's ruling that the '398 patent is unenforceable due to inequitable conduct. *Ferring B.V. v. Barr Labs., Inc.*, 437 F.3d 1181, 1194 (Fed. Cir.), *cert. denied*, 127 S. Ct. 515 (2006). Dissenting from the panel opinion, Judge Newman filed a detailed opinion concluding that Ferring's conduct did not even rise to the level of inequitable conduct, let alone the significantly higher level of intent and materiality required to establish fraud on the PTO. *Id.* at 1195-1205.[1]

1. The distinction between "inequitable conduct" (which was found in the Patent Litigation) and "fraud" (which plaintiffs in this action must prove to prevail) is an important one in antitrust cases based on patent misconduct (so-called *Walker Process* cases). *See Walker Process Equip. Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965). "A finding of inequitable conduct does not by itself suffice to support a finding of *Walker Process* fraud, because 'inequitable conduct is a broader, more inclusive concept than the common law fraud needed to support a *Walker Process* counterclaim.'" *Dippin' Dots, Inc. v. Mosey*, 476 F.3d 1337, 1346 (Fed. Cir. 2007).

d. District Court Antitrust Proceedings. Shortly after the district court issued its summary judgment ruling in the Patent Litigation, wholesale and retail DDAVP purchasers filed this suit in the same district court, asserting a single count of monopolization against Ferring and Aventis based upon the allegedly fraudulent procurement and enforcement of the '398 patent. Their complaint sought relief for an alleged "overarching" scheme, Pet. App. 74a, consisting of the following intertwined acts:

> (1) procuring U.S. Patent No. 5,407,398 (the "'398 patent"), which claims desmopressin acetate tablets, by committing fraud and/or inequitable conduct on the United States Patent and Trademark Office ("PTO"); (2) improperly listing the fraudulently obtained '398 patent in the United States Food and Drug Administration ("FDA") publication known as the Orange Book; (3) filing and prosecuting sham patent infringement litigation against competitors to forestall FDA approval of generic desmopressin acetate tablets; and (4) filing a sham citizen petition to further delay final FDA approval of generic desmopressin acetate tablets.

Id. at 59a.

After Ferring and Aventis filed motions to dismiss plaintiffs' complaint, the same district judge who presided over the underlying Patent Litigation dismissed the complaint with prejudice on two alternative grounds. *Id.* at 40a-51a. First, the court held

that plaintiffs failed to plead facts sufficient to state a claim of fraud on the PTO. *Id.* at 45a. Second, the court held that because plaintiffs lacked standing to challenge the '398 patent under patent law (since they were neither competitors of the patent-holder nor targets of patent enforcement), they also lacked standing to challenge the patent under antitrust law. *Id.* at 50a-51a.

2. The Court of Appeals Decision Below

The plaintiffs appealed to the Second Circuit. Aventis and Ferring moved to transfer the appeal to the Federal Circuit, which had heard the appeal of the underlying Patent Litigation. *See* Motion to Transfer Appeal to Federal Circuit, *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 06-cv-5525 (2d Cir. Feb. 23, 2007). The Second Circuit vacated and remanded the case, holding that: (i) the Second Circuit, rather than the Federal Circuit, had jurisdiction over the appeal, (ii) purchasers have standing to bring antitrust suits based on patent fraud if the patent was "tarnished" by a prior finding of inequitable conduct, and (iii) plaintiffs adequately pled fraud. Pet. App. 16a, 25a, 33a.

The Second Circuit acknowledged that this appeal would fall within the exclusive jurisdiction of the Federal Circuit unless "there are reasons completely unrelated to the provisions and purposes of federal patent law why petitioners may or may not be entitled to the relief they seek under their monopolization claim." Pet. App. 15a-16a. The Second Circuit explained that plaintiffs characterized their claim as based on a single "anticompetitive scheme of which the '398 patent is the linchpin." *Id.* at 15a. The court also observed that the

first three of the four inter-related acts constituting this unitary scheme involved patent issues that otherwise fell within the Federal Circuit's exclusive jurisdiction. *Id.* at 11a. But the court then proceeded to dissect the alleged scheme, characterize each of the alleged acts as an independent "theory" of monopolization, and conclude that the Federal Circuit lacked jurisdiction because *one* of these four "theories" (i.e., the claim that defendants had improperly filed a citizen petition with FDA) could provide a basis for *some* (but not all) of the relief sought by plaintiffs in their complaint without raising patent issues. *Id.* at 11a-16a. It reached this decision despite the fact that the plaintiffs never contended that they could obtain all the relief they sought without adjudicating the core patent fraud claim.

Having concluded that it, rather than the Federal Circuit, had jurisdiction over the appeal, the Second Circuit proceeded to address the foundation for the dismissal — i.e., whether purchasers of a patented product (who clearly lack standing to challenge a patent directly, because they are neither competitors of the patent-holder nor targets of patent enforcement) nevertheless may be accorded standing to challenge the same patent under antitrust law. The Second Circuit then became the first court of appeals to rule that a purchaser who lacks standing to challenge a patent directly may do so indirectly by filing a suit under antitrust law rather than patent law. *Id.* at 25a.[2] The

2. The Second Circuit further held that standing might not be appropriate if the challenged patent had not yet been "tarnished" by "inequitable conduct." Pet. App. 25a. The Second Circuit also overturned the district court's alternative ruling that, as a matter of law, plaintiffs had not pled their patent fraud claims with sufficient particularity. *Id.* at 33a.

Second Circuit did so despite acknowledging that "expanding the universe of patent challengers" creates a "risk of disturbing the incentives for innovation," an issue directly at the heart of patent policy. *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW ADOPTS A JURISDICTIONAL STANDARD THAT CONFLICTS WITH *CHRISTIANSON v. COLT*

A. Under *Christianson*, the Second Circuit Lacked Jurisdiction Over the Appeal Because the Relief Sought by Plaintiffs Depends Upon the Resolution of Patent Issues

The Federal Circuit has "exclusive" appellate jurisdiction over all appeals that are based, "*in whole or in part*," on substantial questions of patent law. 28 U.S.C. § 1295(a) (emphasis added). In *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988), this Court held that the Federal Circuit has exclusive jurisdiction over appeals of antitrust cases involving patent issues if *either* of two tests is met:

(i) The Federal Circuit has exclusive jurisdiction over an appeal if patent law creates the cause of action that is asserted in at least one of the claims in the case. 486 U.S. at 807-08. (This basis for jurisdiction is not at issue here, because (as in *Christianson*) plaintiffs have asserted their claims under federal antitrust law. 486 U.S. at 808-09.)

(ii) The Federal Circuit also has exclusive jurisdiction over an appeal if, with respect to at least *one* of the claims in the case, "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims." *Id.* at 809. If a claim is brought under the antitrust laws, the Federal Circuit has exclusive jurisdiction over the appeal if the plaintiff needs to address substantial patent questions in order to obtain "the relief it seeks" under that claim. *Id.* at 810.

Thus, if a complaint contains more than one claim, it does not matter if most of the claims have nothing to do with patents; as long as *one* claim raises substantial patent questions, the Federal Circuit has exclusive jurisdiction over the *entire* appeal. It is not surprising then, that where plaintiffs allege that a defendant violated the antitrust laws by fraudulently obtaining and enforcing a patent (i.e., a so-called *Walker Process* claim[3]), the Federal Circuit has exclusive jurisdiction over the entire appeal, even if non-patent claims are

3. *See supra* note 1. To prove a *Walker Process* claim, the plaintiff must prove, *inter alia*, that a patent was knowingly and fraudulently (rather than inequitably) obtained, and that it is not just unenforceable but invalid. *See, e.g., Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1070-71 (Fed. Cir. 1998) (finding that inequitable conduct before the PTO will not support a claim for actual or attempted monopolization); *Argus Chem. Corp. v. Fibre Glass-Evercoat Co.*, 812 F.2d 1381, 1383-84 (Fed. Cir. 1987) (same); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 265 (7th Cir. 1984) (holding that "for a fraud to be material in an antitrust sense the plaintiff must show that but for the fraud no patent would have been issued to anyone.").

also asserted in the complaint. *Christianson*, 486 U.S. at 808, 822-24.[4] Moreover, as this Court made clear in *Christianson*, if a claim is predicated upon alternative "theories" (i.e., both patent theories and non-patent theories), the claim is subject to the exclusive jurisdiction of the Federal Circuit *unless* the plaintiff can achieve the "overall success" of the claim (*id.* at 810) and obtain all the "relief it seeks" under that claim (*id.*) by relying on a theory that *does not raise any patent law issues*. The fact that a complaint contains non-patent allegations is of no jurisdictional significance when at least part of the relief sought by the plaintiff is dependent upon the resolution of patent questions.

Thus, the Federal Circuit, not the Second Circuit, has jurisdiction over this appeal — because plaintiffs' entitlement to the *relief they seek* necessarily depends upon resolution of disputed patent issues. *Id.* The core of plaintiffs' claim is that defendants violated the antitrust laws by fraudulently procuring and enforcing an invalid patent — i.e., a *Walker Process* claim that is unquestionably subject to Federal Circuit jurisdiction.

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4. *Accord, e.g., Tiger Team Techs., Inc. v. Synesi Group, Inc.*, No. 2009-1508, 2009 WL 3614522, at *1 (Fed. Cir. 2009); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1330 n.8 (Fed. Cir. 2008); *Jacobsen v. Katzer*, 535 F.3d 1373, 1377 (Fed. Cir. 2008); *Amini Innovation Corp. v. Anthony Cal., Inc.*, 439 F.3d 1365, 1368 (Fed. Cir. 2006); *see also Bd. of Regents, The Univ. of Tex. Sys. v. Nippon Tel. & Tel. Corp.*, 414 F.3d 1358, 1363 (Fed. Cir. 2005); *Hunter-Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1331 (Fed. Cir. 1998) ("With one claim properly in federal court, the others follow...."), *overruled on other grounds by Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999).

Plaintiffs' complaint alleged an anticompetitive "scheme" in which the '398 patent was "the linchpin," and in which three of the four inter-related acts constituting the scheme unquestionably raised issues about the '398 patent. Pet. App. 11a, 15a. Under *Christianson*, that should have ended the court's jurisdictional analysis and compelled the court to remit the appeal to the Federal Circuit, since plaintiffs clearly cannot prove the "overall" scheme and thereby obtain all the relief they seek without addressing patent issues.

In order to wrest the case from the Federal Circuit, the Second Circuit simply disregarded the unambiguous jurisdictional standard articulated by this Court in *Christianson*. Instead, it held that as long as a plaintiff could prove *a* claim under the antitrust laws (not the claim the plaintiff *actually alleged*) and obtain *some* relief (not the relief that the plaintiff *actually sought* in the complaint) without relying on patent theories, then the Federal Circuit lacks exclusive appellate jurisdiction. To reach that counter-intuitive conclusion, the Second Circuit assumed (i) that each of four acts comprising the alleged monopolization scheme constituted an independent "theory" of monopolization, and (ii) that the Federal Circuit would lack jurisdiction as long as *one* "theory" would not require resolution of patent issues. Pet. App. 9a-11a. Although the court conceded that patent law was a necessary element of the first three alleged "theories" of monopolization (i.e., fraud on the PTO, sham enforcement of a fraudulent patent, and improper listing of a fraudulent patent in the FDA Orange Book), the court ruled that the Federal Circuit lacked jurisdiction because the fourth "theory" (i.e., that defendants sought to delay approval of generic DDAVP

by filing a sham citizen petition with FDA) "could plausibly constitute *a* Sherman Act violation" — although clearly not the entire Sherman Act claim that plaintiffs had actually alleged. *Id.* at 14a (emphasis added). The court did not address the obvious fact that the citizen petition allegation involved different conduct at a different time than the alleged patent fraud, which could not possibly provide a basis for all the relief sought by plaintiffs in their complaint.

In short, the Second Circuit rewrote the jurisdictional test established by this Court in *Christianson*, which requires appellate courts to base their jurisdictional determinations on the actual claims set forth in the plaintiffs' complaint and the actual relief that is sought under those claims. 486 U.S. at 808-09. Appellate jurisdiction over patent-based cases "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration," *id.* at 809 (quoting *Franchise Tax Board of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10 (1983)), not predicated upon claims that plaintiffs *might* have asserted or claims that the court *might* conjure up.

Plaintiffs' complaint did not allege an antitrust claim that could be established solely by reliance upon the "theory" that defendants improperly filed a citizen petition with FDA. Rather, plaintiffs expressly alleged an "overarching scheme" to monopolize the market, caused not by any individual act but rather by "[d]efendants' conduct as a whole." Pet. App. 74a. They expressly seek a judgment declaring *all* of defendants' alleged actions (including procurement and enforcement

of the patent) to be unlawful, not just a judgment declaring the citizen petition to be unlawful. Moreover, the complaint alleges that defendants' acts injured plaintiffs during a multi-year period from February 2001 until sometime in 2005 (after generic products entered the market). *Id.* at 63a. The complaint includes a request for treble damages for *this entire period* starting in 2001, but the citizen petition was not even *filed* until 2004, *id.* at 93a, many years after the alleged monopolization scheme had commenced. Thus, the citizen petition allegations could only provide a basis for a small fraction of the damages sought in the complaint; the bulk of the damages sought by plaintiffs requires proof that the patent was invalid. If plaintiffs were to rely solely on their citizen petition "theory" and not any "theory" involving patent issues, they could obtain relief for only five months of the four and a half-year period in which they claim defendants monopolized the market.

As a result, plaintiffs could not prove their "overall" claim of monopolization, and they would not be able to obtain the "relief they seek" by relying solely on their non-patent allegations — which is what *Christianson* requires to divest the Federal Circuit of exclusive jurisdiction. 486 U.S. at 810-12. Indeed, the court below recognized that "patent-related theories are essential to the *overall* relief the plaintiffs seek" — i.e., "because the citizen petition theory covers a time period shorter than the overall allegations." Pet. App. 15a. Nevertheless, the Second Circuit ruled that because this non-patent allegation could "support[ ]" *a* Sherman Act claim (albeit not the entire claim for which relief was actually sought), *id.* at 14a, it could assert jurisdiction over this appeal despite 28 U.S.C. § 1295(a) and

notwithstanding the decisions in other circuits committing *Walker Process* cases to the exclusive jurisdiction of the Federal Cicuit. *See* note 4, *supra.*

B. The Second Circuit's Decision Paves the Way for Parties and Courts to Circumvent *Christianson* and the Federal Circuit's Jurisdiction

The Second Circuit's analysis was based on word-play rather than substance. By labeling the citizen petition allegations a "theory" rather than a "claim," the court ignored the distinction that lies at the heart of the *Christianson* analysis. The court simply assumed that antitrust allegations based on different conduct, causing different injuries, and triggering different potential remedies, were alternative "theories" rather than separate "claims."[5] If permitted to stand, the Second Circuit's rule would divest the Federal Circuit of jurisdiction over any case in which a plaintiff combines patent and non-patent allegations in a single count, instead of articulating them as separate counts. *See Christianson*, 486 U.S. at 809 n.3 ("a plaintiff may not defeat §1338 (a) jurisdiction" by its strategic

5. Tellingly, when it was not purporting to apply the jurisdictional test, the Second Circuit repeatedly referred to the patent-based allegations as "claims," not mere "theories." *See, e.g.*, Pet. App. 8a ("plaintiffs' non-*Walker Process* claims"); *id.* at 20a ("*Walker Process* claims"); *id.* at 21a ("plaintiffs have standing to bring their *Walker Process* claim"); *id.* at 30a ("the sham litigation claim has been adequately alleged"); *id.* at 31a ("plaintiffs also may proceed on their Orange Book claim"). When addressing the jurisdictional test, however, the Second Circuit characterized these same claims as "theories."

pleading choices). By accepting such artful pleading, the Second Circuit effectively eviscerated the second portion of the *Christianson* test and asserted jurisdiction over exactly the sort of case that Congress committed to the exclusive jurisdiction of the Federal Circuit.

The difference between "claims" and "theories" in the *Christianson* jurisdictional test should not be difficult for courts to discern and parties to understand. If the *entire* scope of the relief sought in a complaint (i.e., the full breadth of the judgment sought and all the damages and/or other remedies sought) can be obtained by proving *either* of two alternative factual scenarios, (1) then the scenarios are mere "theories" for proving the same claim, and (2) a regional circuit court may retain jurisdiction over an appeal even if one of the "theories" involves patent-based allegations. But where (as here) a plaintiff can obtain just a *portion* of the relief it seeks by proving a non-patent allegation (i.e., the plaintiff can obtain *all* the relief it seeks only by proving a factual scenario that *does* involve patents), the Federal Circuit has exclusive jurisdiction over the entire appeal.

Plaintiffs (and lower courts) should not be permitted to subvert the jurisdictional test in *Christianson* simply by labeling allegations as "theories" rather than "claims." The Second Circuit's erroneous jurisdictional analysis is tailor-made for manipulation, and the havoc that this decision could wreak is real. By divesting the Federal Circuit of jurisdiction over antitrust cases based on patent fraud simply because "a minor part" of the alleged misconduct involves non-patent activity, the Second Circuit has essentially invited plaintiffs to

engage in appellate forum-shopping. To avoid the Federal Circuit, all a litigant needs to do is include a minor "non-patent" allegation in a claim that is otherwise premised upon patent law issues. If a litigant thinks the Federal Circuit would provide a more hospitable forum for its case, the litigant would merely need to label its patent and non-patent allegations as separate claims in its complaint. Congress could not have envisioned that its grant of exclusive jurisdiction to the Federal Circuit would be subject to such gamesmanship.

C. The Second Circuit's Assertion of Jurisdiction Prevented the Federal Circuit from Addressing a Novel and Important Issue of Patent Law

The Second Circuit's erroneous jurisdictional standard is even more troubling because, by asserting jurisdiction in this case, the Second Circuit ensured that it — rather than the Federal Circuit — would become the first appellate court to determine whether customers who lack standing to challenge patents under patent law should be granted standing to challenge the same patents under antitrust law. In short, the Second Circuit prevented the Federal Circuit — the appellate court created to resolve patent issues in a uniform manner — from addressing one of the most important patent issues to reach the courts in years.

As the Federal Circuit has repeatedly held, and as the Second Circuit acknowledged, purchasers of a patented product (like plaintiffs in this case) lack standing to bring suit to invalidate a patent directly. "[A] patent's validity can be challenged only by a party

(1) producing or preparing to produce the patented product, and (2) being threatened or reasonably likely to be threatened with an infringement suit." Pet. App. 21a. *Accord, e.g., Cordis Corp. v. Medtronic*, 835 F.2d 859, 862 (Fed. Cir. 1987). The court below conceded that plaintiffs here did not meet the well-established test for standing to challenge a patent directly: "As purchasers of DDAVP, the plaintiffs do not satisfy these requirements and cannot directly challenge the '398 patent's validity." Pet. App. 21a. Nevertheless, the court proceeded to rule that plaintiffs who lack standing *under patent law* to challenge a patent have standing to challenge that patent *under antitrust law.*

The court's ruling is likely to have serious adverse consequences for the nation's patent system. In *Walker Process*, this Court cautioned that antitrust laws should not be expanded in a manner that might "chill the disclosure of inventions through the obtaining of a patent because of fear of the vexatious or punitive consequences of treble-damages suits." 382 U.S. at 179-80 (Harlan, J., concurring). The Second Circuit's expansive standing decision will have that chilling effect. As other circuit courts have recognized, "exposing patent activity to wider antitrust scrutiny would weaken the incentives underlying the patent system, thereby depriving consumers of beneficial products." *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1186 (1st Cir. 1994).

By permitting antitrust plaintiffs to challenge patents that could not be challenged directly under patent law, the court below has exposed our nation's patent system to precisely the harm that this Court

warned against in *Walker Process*. Under the Second Circuit's ruling, any customer who wishes to challenge a patent may do so simply by bringing an antitrust claim predicated upon a patent's alleged invalidity. This ruling will undermine the value of patents and weaken the incentives to innovate that the patent system is intended to protect and enhance. The Federal Circuit — the court created by Congress to provide uniform rulings on patent law issues — should be the circuit in which this critically-important patent issue is resolved. By circumventing the jurisdictional test established by this Court in *Christianson*, the Second Circuit usurped this responsibility.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FEDERAL CIRCUIT AND THE SEVENTH CIRCUIT

By ruling that a *Walker Process* claim does not fall within the exclusive jurisdiction of the Federal Circuit, the Second Circuit placed itself in direct conflict with the Federal Circuit. In *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 544 F.3d 1323 (Fed. Cir. 2008), the Federal Circuit expressly stated that *Walker Process* claims are "subject to exclusive federal court jurisdiction under 28 U.S.C. § 1338(a) because the determination of fraud before the PTO necessarily involves a substantial question of patent law." *Id.* at 1330 n.8 (citation omitted). The Federal Circuit reached this unequivocal conclusion even though the *Ciprofloxacin* complaint included other allegations of monopolization that did not rest entirely on patent law. *See id.* at 1329 (describing other claims).

The Second Circuit's decision below cannot be squared with the Federal Circuit's decision to assert appellate jurisdiction in *Ciprofloxacin*. While the Second Circuit treated the *Walker Process* and citizen petition allegations in this case as alternative "theories" that *deprived* the Federal Circuit of jurisdiction, the Federal Circuit in *Ciprofloxacin* properly analyzed similar *Walker Process* and non-patent allegations and correctly treated them as separate "claims" that *vested* exclusive jurisdiction in the Federal Circuit. The only conceivable (albeit meritless) explanation for treating *Ciprofloxacin* differently from the case below is that the *Ciprofloxacin* plaintiffs chose to label their *Walker Process* allegations as a separate count from the non-patent allegations, while the plaintiffs below chose to label all their patent and non-patent allegations as the same count. But the stylistic whims of plaintiffs when they label their claims cannot alter the scope of the Federal Circuit's jurisdiction. To the contrary, this Court has repeatedly held that "courts will not permit plaintiff to use artful pleading to close off defendant's rights to a federal forum." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981). It is the obligation of the court to determine the "real nature" of the claim "regardless of plaintiff's characterization." *Id.*; *see also Christianson*, 486 U.S. at 809 n.3. Plaintiffs here claim that defendants fraudulently obtained and enforced an invalid patent. Regardless of the label affixed to this claim by plaintiffs, it constitutes a claim that is unquestionably committed to the exclusive jurisdiction of the Federal Circuit, as *Ciprofloxacin* recognizes.

The decision below also conflicts with the Seventh Circuit's decision in *U.S. Valves, Inc. v. Dray*, 190 F.3d

811 (7th Cir. 1999), and the Federal Circuit's decision in the same case, *U.S. Valves, Inc. v. Dray*, 212 F.3d 1368 (Fed. Cir. 2000). Both circuit courts agreed that the Federal Circuit had exclusive jurisdiction over an appeal where — as is the case here — plaintiff could not achieve the overall success of its claim and could recover only *some* of the damages it sought without resolving disputed patent issues.

In *U.S. Valves*, the defendant (Dray) was a patent-holder who granted U.S. Valves an exclusive license to make and sell internal piston valves covered by his patent. Dray later began selling internal piston valves and sliding ring valves. U.S. Valves filed suit against Dray, alleging that Dray's sale of both valves violated the exclusivity provision of the patent license agreement. In the district court, Dray conceded that his sale of the internal piston valves infringed the patent. This concession enabled the district court to rule that Dray had breached his patent license agreement with U.S. Valves *without* adjudicating any disputed issues regarding the patent. The district court did not address whether Dray's sale of the sliding ring valves also infringed the patent, or whether U.S. Valves would be entitled to additional damages as a result.

On appeal to the Seventh Circuit, Dray argued that the case should be transferred to the Federal Circuit, because patent law was a necessary element of that *portion* of U.S. Valves' infringement claim dealing with Dray's sale of sliding ring valves. 190 F.3d at 812-13. Relying upon *Christianson*, the Seventh Circuit examined the complaint and agreed. Even if U.S. Valves was able to prove that Dray's sale of internal piston

valves breached the license agreement without addressing disputed patent issues (because Dray had already conceded those valves were within the scope of the patent), the full amount of the damages to which U.S. Valves was entitled could not be determined without resolving whether Dray's sale of the sliding ring valves infringed the licensed patent. *Id.* at 813-15. Accordingly, the appeal was transferred to the Federal Circuit.

The Federal Circuit reviewed the jurisdictional issue *de novo* and agreed that it had exclusive jurisdiction over the case. Since "*some* of the valves that [defendant] Dray sold were of the sliding ring variety, a court must interpret the patents and then determine whether the sliding ring valve infringes these patents." 212 F.3d at 1372 (emphasis added). The fact that the plaintiff was able to establish a *portion* of its overall damages claim without raising disputed patent issues did not deprive the Federal Circuit of exclusive jurisdiction, since Dray's sale of sliding ring valves required the court to resolve a patent "case within a case" to determine if such valves were covered by the patent at issue. Consequently, the Federal Circuit concluded that "patent law is a necessary element of U.S. Valves' breach of contract action . . . [and] this court reaches the same conclusion as its sister circuit and asserts jurisdiction." *Id.*

Because U.S. Valves could not achieve the overall success of its two-part damages claim without raising disputed patent issues, both the Seventh Circuit and the Federal Circuit concluded that the Federal Circuit had exclusive jurisdiction over the case. In contrast, the Second Circuit ruled that the Federal Circuit did *not*

have exclusive jurisdiction over this case because plaintiffs could obtain *some* of the damages they sought without addressing disputed patent issues.

The jurisdictional rule followed in *U.S. Valves* is the correct one. Regardless of whether allegations are deemed a "theory" or a "claim," the Federal Circuit has exclusive jurisdiction in any patent-based case in which patent issues must be resolved in order for plaintiffs to achieve "overall success" and obtain all the damages (or other relief) they seek. Here, plaintiffs' citizen petition allegations cannot possibly provide a basis for obtaining all the relief they seek. Because the citizen petition was not even filed until the end of the alleged monopolization period, the patent fraud issues *must* be addressed if plaintiffs are to obtain damages (or other relief) for the entire period at issue in this case.

The conflict between the jurisdictional standards used by the Second Circuit and the Federal Circuit is further underscored by the recent decision of the Federal Circuit in *Davis v. Brouse McDowell, L.P.A.*, __ F.3d __, No. 2009-1395, 2010 U.S. App. LEXIS 4266 (Fed. Cir., March 2, 2010). In *Davis*, the plaintiff brought a single claim for common law malpractice against her attorney, based on the attorney's negligence in preparing and filing patent applications for her invention. Plaintiff's malpractice claim was based on two factual allegations: that her attorney (i) failed to file international patent applications under the Patent Cooperation Treaty, and (ii) committed errors in preparing her application for a U.S. patent. It was undisputed that issues of U.S. patent law were raised *only* by the second allegation. *Id.* at *9-10.

Plaintiff's argument against Federal Circuit jurisdiction was remarkably similar to the argument adopted by the Second Circuit below. She argued that she had alleged "a single claim" for malpractice supported by two "theories." Because it was undisputed that one of these "theories" did not involve U.S. patent issues, she argued that the Federal Circuit lacked jurisdiction. *Id.* The Federal Circuit, however, rejected this argument and ruled that it had exclusive jurisdiction. Even though plaintiff had combined her allegations into a single claim, the Federal Circuit ruled that the allegations were not mere "theories" for the same claim. The Court explained that plaintiff's allegation relating to the international patent applications and her allegation relating to the U.S. patent application arose out of "different sets of operative facts," and therefore were different "claims," not different "theories." *Id.* at *10. The fact that plaintiff combined these different allegations of negligence into a single claim in her complaint did not deprive the Federal Circuit of jurisdiction, because some of the allegations involved disputed U.S. patent issues.

There is no way to reconcile the jurisdictional ruling in *Davis* with the Second Circuit's ruling below. Here, plaintiffs' citizen petition claim and patent fraud claim involved different conduct, before different agencies, during different time periods, causing different alleged damages; thus, the claims unquestionably involved "different sets of operative facts." The Federal Circuit's assertion of jurisdiction in *Davis* is in direct conflict with the Second Circuit's finding that the citizen petition and the patent fraud claims are simply alternative "theories" that deprive the Federal Circuit of jurisdiction. The

Davis case confirms that there is a split among the circuits regarding the standards for determining Federal Circuit jurisdiction.

III. THE RULING BELOW RAISES IMPORTANT QUESTIONS OF FEDERAL PATENT LAW AND UNDERMINES CONGRESS' PURPOSE IN CREATING THE FEDERAL CIRCUIT

Although plaintiffs have brought their claim under federal antitrust law, this case is first and foremost a patent case. The '398 patent is "the linchpin" of plaintiffs' claim, Pet. App. 15a, and plaintiffs will need to prove the '398 patent is invalid in order to obtain the relief they seek. They will also need to prove that defendants did not have any basis for believing they would prevail on their patent infringement claims. Thus, hotly disputed issues of patent law will lie at the core of this case. This is precisely the sort of case that Congress intended the Federal Circuit to hear on appeal. *See, e.g.*, *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*,, 375 F.3d 1341, 1357 (Fed. Cir. 2004), *rev'd on other grounds*, 546 U.S. 394 (2006) (*Walker Process* claims raise "an issue *unique* to the patent law"). But under the new jurisdictional test adopted by the Second Circuit, a litigant may deprive the Federal Circuit of jurisdiction over patent-based cases like this one simply by engaging in artful pleading. All a litigant needs to do is add some non-patent allegation to its core patent fraud claim; as long as the non-patent allegation could be characterized as supporting any claim (even a much narrower claim than the one alleged in the complaint), the Federal Circuit would be divested of its exclusive jurisdiction. That outcome is contrary to the clear intent of Congress in creating the Federal Circuit.

Congress' decision to vest the Federal Circuit with exclusive jurisdiction over cases relating *in whole or in part* to patent law was motivated by a Congressional concern with lack of uniformity in the patent laws. *See* H.R. Rep. No. 97-312, at 22 (1981) ("The infrequency of Supreme Court review of patent cases leaves the present judicial system without any effective means of assuring evenhandedness nationwide in the administration of the patent laws."). A key Congressional objective in creating the Federal Circuit was "to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exist in the administration of patent law." *Id.* at 23; *see also* S. Rep. No. 97-275, at 5 (1981) ("The creation of the Court of Appeals for the Federal Circuit will produce desirable uniformity in this area of the law."). Congress did not intend for the Federal Circuit to be deprived of jurisdiction of "patent issues merely couched in antitrust terms." S. Rep. No. 97-275, at 37-38. The important question of whether purchasers of patented products should be able to circumvent longstanding patent rules prohibiting them from filing patent challenges, merely by formulating those patent challenge as "antitrust" claims, is exactly the sort of patent policy issue that the Federal Circuit should resolve uniformly, rather than allowing different rules to spring up among regional circuit courts. Indeed, the Second Circuit's standing ruling cannot be reconciled with existing case law in the Federal Circuit, which has sought to harmonize patent and antitrust jurisdictional standards. *See, e.g.*, *Unitherm Food Sys.*, 375 F.3d at 1358 (applying same jurisdictional standards in patent declaratory judgment suit and antitrust suit).

Congress' decision to vest *exclusive* appellate jurisdiction of patent-related appeals in the Federal Circuit was also intended to address widespread concern with the practice of "forum shopping" by litigants looking to find friendly appellate courts in patent cases. *See* H.R. Rep. No. 97-312, at 22 ("A single court of appeals for patent cases will promote certainty where it is lacking to a significant degree and will reduce, if not eliminate, the forum shopping that now occurs."); *id.* at 23 ("Removing the incentives to forum-shop also will reduce cost to litigants."). Permitting the Second Circuit's erroneous jurisdictional decision to stand will frustrate the purpose of the Federal Circuit and facilitate the practice of forum shopping that Congress sought to eliminate when it created the Federal Circuit. The jurisdictional test adopted here by the Second Circuit will be so easy to manipulate that litigants will be able to determine in advance whether the Federal Circuit or a regional circuit court will hear their patent-based appeals.

If the decision of the Second Circuit is left standing, jurisdiction over patent-related appeals will be defined by the creativity of litigants in formatting the allegations in their complaint, and by their skills in "artful" pleading. Form will trump both substance and Congressional intent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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